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NASA

National Aeronautics and
Space Administration

Washington, D.C.
20546

JAN 30 1984

Reply to Attn of:

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Deputy General Counsel
Central Intelligence Agency (Langley)
Washington, DC 20505

Dear

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Enclosed is a copy of the final memorandum of law (brief) regarding the interpretation of section 207(a) of the Ethics in Government Act, as amended. This brief is the final product of a number of agencies who have participated in its drafting. We would appreciate it if you would review the brief and contact Helen Kupperman of my office (453-2465) by close of business February 6, 1984, as to whether or not you wish to join with a number of agencies in submitting the brief to the Office of Government Ethics for transmittal to the Department of Justice, Office of Legal Counsel.

Also, enclosed is a piece of paper stating that you do concur in the memorandum of law sent to you with this letter. If your agency does agree with the brief, your General Counsel or Deputy General Counsel should sign the concurrence and return it to me not later than Monday, February 6, 1984, at NASA Headquarters, Office of General Counsel, 400 Maryland Avenue, S.W., Washington, DC 20546. We are aware that in some agencies the work in the ethics program regarding review of public and confidential financial disclosure reports is performed by someone who is not in the General Counsel's office. In such cases, we would, of course, accede to the concurrence being by that official, although we would wish to point out that this is a legal brief and that it may be more helpful if the the General Counsel or Deputy General Counsel also signs the concurrence. The concurrence, of course, should be signed with the title of the person and the name of the agency. This signed concurrence will be appended to a letter transmitting the memorandum of law to the Office of Government Ethics.

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We thank you for your cooperation in this matter and hope that you will join with the many agencies in supporting this memorandum of law.

Sincerely,

S. Neil Hosenball

S. Neil Hosenball
General Counsel

Enclosures:
Memorandum of Law
Concurrence sheet

I concur in the memorandum of law entitled, Ethics in Government Act of 1978, as amended--Authority of the President to Require Disclosure of Financial Information from Mid-Level Federal Employees and Special Government Employees, submitted to the Office of Government Ethics for transmittal to the Office of Legal Counsel, Department of Justice.

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

10 Feb 1983

MEMORANDUM FOR DAVID R. SCOTT
Acting Director
Office of Government Ethics
Office of Personnel Management

Re: Confidential Financial Disclosure Reports

This memorandum responds to your request for our opinion concerning the range of the President's discretion in determining what information should be included in confidential financial disclosure reports filed by federal employees in positions below the level of GS-16 in the General Schedule. You have explained that the Office of Government Ethics plans to prepare a draft Presidential directive or order establishing a government-wide system of confidential financial disclosure for certain such employees, which would be issued pursuant to § 207(a) of the Ethics in Government Act of 1978 (the Act). 1/ That subsection provides, inter alia, that the President "may require officers and employees in the executive branch" who are not covered by the Act's provisions establishing a system of public financial disclosure "to submit confidential reports in such form as is required by this title." (Emphasis added.)

You have asked us to explain the meaning of the foregoing underscored language, "in such form as is required by this title." In particular, you have asked, first, whether it requires that confidential financial disclosure reports contain the same information required by other provisions of title II of the Act to be included in public financial disclosure reports. Second, you have asked, assuming that the answer to the first question is yes, whether the confidential financial disclosure reports must be identical in every respect to public financial disclosure reports, which now are submitted on Form SF 278.

1/ Pub. L. No. 95-521, 92 Stat. 1824. Title II of the Act, which contains the provisions establishing financial disclosure requirements for Executive personnel, is codified at 5 U.S.C. App. (1976 ed., Supp. V 1981).

For the reasons discussed below, we have concluded, first, that § 207(a) is most properly construed as requiring that confidential financial disclosure reports include the same information required by other provisions of title II to be included in public financial disclosure reports. This construction means, in essence, that when the statute requires certain information to be requested in public financial disclosure reports, the same information must be requested in confidential financial disclosure reports prepared for a government-wide system of confidential financial disclosure ordered by the President pursuant to § 207(a). In response to your second question, we do not believe that such confidential financial disclosure reports necessarily must be identical to public financial disclosure reports to the extent that the public financial disclosure system, utilizing Form SF 278, includes more detailed information than is required by title II. All that is necessary, again, is that such confidential financial disclosure reports provide the same information that is required to be contained in public financial disclosure reports.

I. Background: The Statutory Scheme in General and the Language of § 207(a) in Particular

Title II of the Ethics in Government Act establishes a system of financial disclosure for Executive Branch personnel. A chief feature of the statutory scheme is that financial reports prepared by certain officials subject to the statute's provisions are to be made available to the public by the agency with which the reports are filed. 2/ In addition, each agency is directed to permit inspection of each such report (or a copy thereof) by "any person requesting such inspection or copy." 3/

The required contents of financial reports to be made available to the public are set forth in considerable detail in § 202 of the Act. In general, such reports are to include the following categories of information: the source, type and amount of income; gifts above certain values; interests in property; liabilities; receipts from the sale or exchange of real property or securities; the identity of all positions held as an officer, director, trustee, partner, proprietor, employee or consultant of any business enterprise; and any

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2/ Section 205(a) of the Act.

3/ Section 205(b) of the Act.

agreements with past or future employers. 4/ The persons covered by the public financial disclosure requirements of § 202 include, inter alia, the President, the Vice President, and each officer or employee in the Executive Branch whose position is classified at GS-16 or above or the basic pay for which is fixed at a rate equal to or greater than the minimum rate of basic pay for GS-16. 5/

Title II includes a provision, § 207(a), authorizing the President to establish a system of confidential, or non-public, financial disclosure for employees not otherwise covered -- that is, for employees in the Executive Branch in positions below the level of GS-16. Section 207(a) provides:

> The President may require officers and employees in the executive branch (including the United States Postal Service and members of the uniformed services) not covered by this title to submit confidential reports in such form as is required by this title. Subsections (a), (b), and (d) of section 205 [which deal with the public availability of financial disclosure reports] shall not apply with respect to any such report.

(Emphasis added.)

The question presented by the foregoing provision -- and by your opinion request -- is what the phrase, "in such form as is required by this title," mandates.

II. Analysis: the Legislative Purpose Behind § 207(a) as Revealed in the Legislative History

Normally, of course, analysis of legislation begins with the statutory language itself; legislators are presumed to have intended to accomplish what the ordinary meaning of the law denotes. 6/ This canon of construction, however, is of limited utility in the present situation. The most direct

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4/ Section 202 of the Act (which is denominated, "Contents of reports").

5/ See § 201(f) (listing the categories of covered officials).

6/ See, e.g., Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979); International Brotherhood of Teamsters v. Daniels, 439 U.S. 551, 558 (1979).

reading of the language, "in such form as is required by this title," appears foreclosed from the outset: title II does not anywhere specify a form as such (as opposed to the contents) of financial disclosure reports. 7/ On this basis, one might suggest that the phrase is essentially meaningless, and therefore that it provides no constraint whatsoever on the President's discretion to require employees to file confidential financial disclosure reports under § 207(a). The critical problem with any such suggestion, however, is that it ignores the fundamental precept that statutory language is to be given meaning wherever possible, and is not to be assumed to be a nullity. 8/

In the present situation, one can discern the purpose underlying the quoted language of § 207(a) by reference to certain, albeit at times somewhat less than completely determinate, passages in the legislative history. Of importance are remarks in the leading Committee report on the bill that eventually was enacted as the Ethics in Government Act, and in the House floor debate about the specific provision in question. These discussions, which we will analyze, indicate Congress' intent that confidential financial disclosure reports and public financial disclosure reports would constitute one comprehensive system of financial disclosure. They support the view that, despite § 207(a)'s use of the word "form," what Congress intended was that the substance of the two types of reports be essentially synonymous. So understood, the quoted language of § 207(a) may be viewed as a shorthand reference to the information required by title II to be included in public financial disclosure reports.

A. The House Committee Report

Of particular importance is the report of the House Committee on Post Office and Civil Service, 9/ which underscored the Committee's intent that there be one "comprehensive" system of financial disclosure for federal employees. The

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7/ The word "form" is defined, inter alia, as "the shape and structure of something as distinguished from the material of which it is composed." Webster's Third New International Dictionary 892 (1976).

8/ See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

9/ See H.R. Rep. No. 642, Part 1, 95th Cong., 1st Sess. (1977).

report also contrasted the bill's "comprehensive" system with the system of confidential financial reporting pursuant to Executive Order No. 11222, 10/ which was the source of authority for such a financial disclosure system prior to the Act's passage:

> The committee firmly believes that legislation relating to financial reporting and disclosure for executive branch employees should be comprehensive. Under H.R. 6954 [which was the Carter Administration's bill] and similar proposals, financial reporting requirements for the executive branch only go halfway. With respect to employees at GS-15 or below, the financial reporting system established and administered under Executive Order No. 11222, the same system whose failure has resulted in the need for this legislation, will remain in place. Under the committee's bill, all financial reporting and disclosure in the executive branch will be pursuant to statute. The current executive order system will be abolished. 11/

(Emphasis added.)

Accordingly, the Committee report stressed that "the executive order system" of confidential financial reporting -- which, in fact, has not to date been fully supplanted -- is to be "abolished" by a system pursuant to statute that is to be "comprehensive." In discussing the possible charge that the Committee's bill would impose too great a paperwork burden on employees, the report reiterated that the bill's system is to be comprehensive:

> To the extent that there is an increase in paperwork, the committee believes such an increase is clearly justified by the benefits which will be achieved through having one comprehensive reporting system for all civilian employees in the executive branch. 12/

(Emphasis added.)

10/ 30 Fed. Reg. 6469 (May 11, 1965).

11/ H.R. Rep. No. 642, Part 1, 95th Cong., 1st Sess. 26 (1977).

12/ Id. at 27.

The foregoing passages indicate that the Committee did not intend that there would be more than one financial reporting system. To be consistent with this general intent, it seems necessary to construe § 207(a) of the Act as requiring that confidential financial reports contain the same information as required for public financial reports. 13/

B. House Floor Debate

Support for the foregoing interpretation of § 207(a) may be gleaned from the floor debate in the House of Representatives in September, 1978, one month before the Act was enacted. On September 20, 1978, Representative Schroeder, Subcommittee Chair of the House Post Office and Civil Service Committee, summarized some of the provisions of the Committee's bill, noting that:

> . . . . there is a provision for confidential filing by lower level personnel, but it must be done, as the Post Office and Civil Service Committee's bill required, according to the same form as public filing will be. 14/

(Emphasis added.)

On September 27, 1978, Representative Harris described the confidential reporting provision as follows:

> The language [as enacted in § 207(a)] says that the President may require officers and employees

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13/ It is possible to argue that a comprehensive system of reporting could include two different types of disclosure reports. However, such a suggestion seems to ignore the emphasis on "one" system in the quoted passages from the Committee report. See H.R. Rep. No. 642, Part 1, 95th Cong., 1st Sess. 27 (1977). Moreover, it disregards that the Congress clearly sought to abolish the separate Executive Order system of confidential financial reporting, and thereby sought to create one comprehensive system; it would be counterproductive from this perspective to authorize two different reporting systems after making such an effort to eliminate the separate confidential reporting system.

14/ 124 Cong. Rec. 30419 (Sept. 20, 1978).

> in the executive branch, including the U.S. Postal Service and uniformed services not covered by this part[,] to submit confidential reports in such form as required by this part. 15/

(Emphasis added.)

Although the foregoing comments are not inordinately illuminating because they merely repeat the statutory word "form" without elaborating on its meaning, they nonetheless do confirm that the phrase "such form" (which appears in § 207(a) as enacted) was intended to have the identical meaning as the phrase "the same form." Even though this does not tell us what "form" means, at least the comments confirm generally that deviations from the public financial reporting requirements in title II are to be disfavored in the establishment of the confidential financial reporting system.

This understanding of § 207(a) is buttressed by additional floor discussion involving Representatives Gonzalez, Wiggins and Danielson on September 27, 1978. Representative Gonzalez spoke in opposition to any provision giving the President broad discretion to require such confidential financial reports as the President may prescribe, 16/ stating that any such provision would make the President "a total czar" in this context. 17/ In response, Representative Wiggins noted that "[e]arlier on during the consideration of this bill, broad authority was given to the President to require any information of any Government employee . . . ." However, such a grant of broad discretion was criticized, and "instead much narrower language was adopted." 18/ Representative Wiggins added:

15/ 124 Cong. Rec. 31985 (Sept. 27, 1978).

16/ The language that Representative Gonzalez particularly objected to provided that: "The President may require officers and employees of the executive branch not covered by this title to submit confidential reports in such form and manner as he shall prescribe." 124 Cong. Rec. 32002 (Sept. 27, 1978).

17/ 124 Cong. Rec. 32002 (Sept. 27, 1978).

18/ Id.

> Now, under section 207(a), the President may require of those employees who are not covered confidential reports, (sic.) and I quote now from the bill 'in such form as is required by this part.'
>
> It was the intent of the drafters of that language to limit the power and the discretion of the President to require only such information from noncovered employees as would be compelled of covered employees under this bill. 19/

(Emphasis added.)

Representative Wiggins then asked Representative Danielson -- who was Subcommittee Chairman of the House Judiciary Committee, which had been involved in drafting the bill -- whether his understanding of § 207(a) was correct:

> Rep. Wiggins: Is it not true that the President could not compel the confidential report of information which was not required to be disclosed under this bill?
>
> Rep. Danielson: That is correct . . . The President would have a right to require officers and employees who are not covered by this part . . . to submit [a] confidential report but in a form which is prescribed by this part.
>
> Rep. Wiggins: Yes. 20/

(Emphasis added.)

The foregoing remarks are significant, first, because they confirm that the limitation in § 207(a) on the President's discretion in determining what information to require in confidential financial disclosure reports was intended by Congress to be a meaningful constraint. This confirmation directly contravenes the suggestion that the statutory language, because of the confusion it creates, should be ignored. More particularly, the remarks support the view

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19/ Id.

20/ Id. at 32003.

that Congress intended that the confidential financial disclosure reports would request the same information as the public financial disclosure reports governed by title II. Any other interpretation, in our view, would not satisfactorily take account of Representative Wiggins' statement that the bill's drafters intended to allow the President to require in confidential reports "such information from noncovered employees as would be compelled of covered employees. . . ." (Emphasis added.) In short, confidential financial reports are not to require different information, but rather are to require "such information . . . as" called for by title II in public reports.

This interpretation is not contradicted by any other indications of Congressional intent of which we are aware.

III. Conclusion

In conclusion, we believe that § 207(a) requires that reports prepared as part of a government-wide system of confidential financial disclosure contain the same information required by other provisions of title II to be contained in public financial disclosure reports. 21/ To the

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21/ Considerations of administrative convenience and efficiency may well support the use of essentially identical forms for public as for confidential financial reporting. While we express no view regarding the policy implications of this matter, in order to preserve the truly confidential character of confidential reports, it would appear prudent to assure that public and confidential reports be readily distinguishable in some fashion by those who process them.

extent that Form SF 278 contains any request for information that is not specifically required by title II, such information need not be requested on confidential financial disclosure reports. 22/

Ralph W. Tarr

Ralph W. Tarr
Deputy Assistant Attorney General
Office of Legal Counsel

22/ This conclusion is not only borne out by the legislative history, discussed above, but also is consistent with the views expressed in earlier Office of Legal Counsel memoranda, to which we adhere. In an opinion dated March 26, 1979, for the Director of this Department's Internal Audit Staff, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, it is stated: ". . . § 207(a) appears to require that any confidential reports the President may require under that section be in the same form as the public forms filed by higher level personnel. If so, the present more limited confidential forms now in use in the Department would have to be replaced by the more extensive forms to be filed by persons GS-16 and above." (Page 3; emphasis added.) In a letter dated May 1, 1979, to Mr. Bernhardt Wruble, Director of the Office of Government Ethics, Office of Personnel Management, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, it is stated that: "The effect of §§ 207(a) and (c), when read together, would appear to be that agencies may no longer require employees to file the more limited confidential reports on the authority of E.O. 11222 but that the President may issue a new Executive Order requiring Executive Branch employees to file, on a confidential basis, reports containing all the information required in Title II . . . Based on the language and legislative history of § 207, then, it would appear that the confidential reporting program under Executive Order 11222 has been superseded and that any confidential reports required by the President in the future must be on Forms 287 or 287A or an equivalent form." (Page 2; emphasis added.) (We should add that the form for confidential financial disclosure was, and is, Form 278, not 287.)

1 MAY 1979

Mr. Bernhardt K. Wruble
Director
Office of Government Ethics
Office of Personnel Management
1900 E Street, N.W. (Room 5315)
Washington, D.C. 20415

Dear Mr. Wruble:

As you know, there is a question whether the financial reporting provisions in Title II of the Ethics in Government Act supersede preexisting reporting programs, including the confidential reporting program under Executive Order 11222. Ed Kneedler has raised this issue with your office informally on several occasions. It was raised indirectly again by the reference to the confidential reporting system in § 735.502(c) of the proposed interim regulations you sent to us for review on April 27, although I understand you have since decided to delete that section from the regulations. I believe this question should be resolved soon, because the June 30 deadline in the Justice Department and elsewhere for filing reports required by E.O. 11222 is fast approaching.

The question regarding the viability of the confidential reporting program established under E.O. 11222 is raised by §§ 207(a) and (c) of the Act. Section 207(c), as enacted, states that the "provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest." This subsection on its face appears to supersede the confidential reporting program under agency regulations and general OPM regulations in 5 CFR, Part 735, issued on the authority of E.O. 11222 and 5 U.S.C. § 7301. The report of the House Post Office and Civil Service Committee, which reported a bill containing language identical to that in § 207(c), just quoted, expressly states that the reporting

requirements under E.O. 11222 and 5 CFR, Part 735 were intended to be superseded. Representative Schroeder's explanation of H.R. 13850, the compromise bill supported by the four House Committees having jurisdiction over the subject matter, is to the same effect. 124 Cong. Rec. H 10190 (Daily ed. Sept. 20, 1978).

Section 207(a) of the Ethics in Government Act affirmatively authorizes the President to require officers and employees in the Executive Branch not covered by Title II to submit confidential reports "in such form as is required by" that title. The effect of §§ 207(a) and (c), when read together, would appear to be that agencies may no longer require employees to file the more limited confidential reports on the authority of E.O. 11222 but that the President may issue a new Executive Order requiring Executive Branch employees to file, on a confidential basis, reports containing all the information required in Title II. Representative Schroeder described the comparable section in the House compromise bill in just this fashion, stating that the bill contained a "provision for confidential filing by lower level personnel, but it must be done . . . according to the same form as public filings will be." 124 Cong. Rec. H 10188 (Daily ed. Sept. 20, 1978). The Senate bill contained no section describing its intended effect on existing reporting programs, and the Conference Report, in accepting the House language, gives no further explanation.

Based on the language and legislative history of § 207, then, it would appear that the confidential reporting program under Executive Order 11222 has been superseded and that any confidential reports required by the President in the future must be on Forms 287 or 287A or an equivalent form. At a minimum, I cannot advise the persons in the Department responsible for administering the confidential reporting program in the past to require those reports by June 30 until this question is resolved.

Aside from the point just raised, I see no other legal problems in the proposed interim regulations, although I am a bit troubled by the suggestion in § 735.505(b)(ii) that an agency may request a person seeking a report to furnish his name. This could be coercive in practice, at least, unless the requester was expressly told that he did not have to furnish his name as a condition of receiving the report.

Sincerely,

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

MEMORANDUM OF LAW

SUBJECT: Ethics in Government Act of 1978, as amended--
Authority of the President to Require Disclosure of
Financial Information from Mid-Level Federal Employees
and Special Government Employees

The language and legislative history of section 207(a) of Public Law 95-521, the Ethics in Government Act of 1978, (hereinafter the Ethics Act) and of Public Law 96-19, which amended the Ethics Act, allows the President substantial discretion regarding the kinds of financial information he may require mid-level federal employees and special government employees to disclose. We need not require such employees to reveal the same information that high-level employees and political appointees must reveal in public disclosure forms.

BACKGROUND

Section 201(d) of the Act requires certain high ranking government officials to file annual public financial disclosure reports. Section 201(f) defines the categories of officials subject to this requirement. They include political appointees; Schedule C appointees; and civilian officials paid at GS-16 or higher rates; and military officers of comparable rank (0-7 or above). The contents of the reports are mandated in elaborate detail in Section 202(a). This information is publicly available under Section 205.

Less than a year after the Ethics Act took effect, it was amended by Public Law 96-19 to exclude from the public financial

disclosure requirement those special government employees who serve in Government no more than 60 days.

Section 207(a) authorizes, but does not compel, the President to require disclosure of financial information from employees not covered by the public financial disclosure requirements of the Ethics Act. It provides, in pertinent part:

> "(a) The President may require officers and employees in the executive branch (including the United States Postal Service and members of the uniformed services) not covered by this title to submit confidential reports in such form as is required by this title."

Information supplied by employees under this provision is not subject to public disclosure, but may be used by the government in order to detect and prevent conflicts of interest.

I. SECTION 207(a) OF THE ETHICS ACT DOES NOT REQUIRE THE SAME INFORMATION FOR CONFIDENTIAL REPORTS AS FOR PUBLICLY AVAILABLE REPORTS

The crucial phrase "in such form as is required by this title" determines the information the President may (or must) require to be disclosed by mid-level employees. The phrase is ambiguous on its face and must be interpreted by reference to the structure and legislative history of the Act.

INTRODUCTION

The legislative history of this provision is complex, because a jurisdictional dispute among four House Committees produced several competing bills which ultimately were harmonized by a compromise substitute adopted on the floor. Congress considered

two competing systems of disclosure for those employees not covered by the public financial disclosure requirement--one that would have compelled them to file long-form disclosure statements, and another that continued the President's existing broad discretionary authority to require disclosure in the manner he elected. From all that appears, Congress rejected the mandatory system and adopted the discretionary system. The most sensible reading of the legislative history of the Ethics Act is that Congress intended to grant the President complete discretion as to the financial information to be disclosed by employees whose positions are not expressly referenced in section 201, as long as he did not require them to reveal information beyond that which high-level employees and political appointees were compelled to disclose.

LEGISLATIVE HISTORY OF SECTION 207(a)

The Ethics in Government Act originated in a proposal transmitted to Congress by President Carter on May 3, 1977. That proposal contained many of the salient features of what became Title II of the Ethics Act. The Senate quickly adopted the Carter proposal, with certain modifications and as renumbered as Title III of S. 555.[1] This bill applied only to GS-16's and

1 See S. Rep. No. 95-170, 95th Cong. 1st Sess. 21-28 (May 16, 1977).

above and was silent as to the President's authority to require disclosure from lower ranking employees.[2]

On May 5, 1977, the Carter bill was introduced in the House as H.R. 6954 and referred jointly to the Judiciary, Post Office and Civil Service, and Armed Services Committees. The Judiciary Committee already was considering H.R. 1, which would have required members of Congress, all federal justices and judges, and executive branch officers and employees paid at the GS-15 level or above to file public financial disclosure statements with the Comptroller General.

1. Post Office Committee Bill. As introduced, H.R. 6954 established a mandatory long-form disclosure system for GS-16's and above. Section 107 further provided that "[n]othing in this title shall be construed to prevent the President from requiring officers or employees not covered by this title to submit confidential financial statements." During deliberations before the Post Office and Civil Service Committee, the Comptroller General recommended that this section be deleted and replaced by a provision requiring all lower ranking employees performing auditing, contracting or grantmaking activities to file the long-form disclosure report "containing the information described

2 Senator Ribicoff on April 25 introduced an amendment to S. 555 which in Section 307(a) would have applied the same long-form disclosure requirements to all employees down to GS-13, and contracting and procurement officials in lower grades. The Senate rejected this amendment.

in section 102 with the head of agency . . . at the time specified in section 101(d)." Letter dated June 16, 1977 from Elmer B. Staats to Robert C. Nix, H.R. Rep. No. 95-642 part 1, 95th Cong., 1st Sess. 73 (1977).

On September 28, 1977, the Committee reported H.R. 6954, which was restricted to reporting by executive branch officials (excluding military officials).[3] The bill essentially adopted the Comptroller General's recommendation. It required submission of a detailed, public financial report by all political officials or employees compensated at the GS-16 level or above. The original Section 107 was deleted. In its place, the bill required submission of a long-form report from a new group of employees, defined in Category 8 as "any individual appointed or employed in a civilian position in the executive branch with respect to which there is in effect a determination by the Director [of the Office of Government Ethics], by regulation,"[4] that he discharged auditing, contracting or procurement duties or that the duties of his position justified requiring such disclosures. The bill and the Committee Report provided explicitly that any GS-15 or lower paid employees included within Category 8 would file the same information as higher level officials.[5] The major difference

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3 The Armed Services Committee reported its variant of the Carter bill on October 17, 1977. See H.R. Rep. No. 95-642 part 2.

4 H.R. Rep. No. 95-642 part 1, 95th Cong., 1st Sess. 3 (1977).

5 Id. at 31.

was that reports by Category 8 employees would not be subject to public disclosure, while those of other officials would be.[6]

However, the Post Office and Civil Service Committee bill did retain a degree of flexibility in the rulemaking authority of the Director of the Office of Government Ethics. He was empowered, by regulation, not only to determine the employees covered by Category 8, but also to exclude from coverage any individual or group of temporary or intermittent employees and any individual or group of employees who were in Schedule C of the excepted service (§ 7362(b)). Furthermore, the Director could, by regulation, add to statutory reporting requirements (§ 7363(b)(9)), and, "exclude from the reporting requirements of this section any information, but only if he determines such exclusion would be consistent with the purposes of this subchapter" (§7363(d)).

Granting authority to the Director to exclude information from the reporting requirements is most significant for our purposes, for it demonstrates that even in the "long form" approach of the Post Office and Civil Service Committee there was recognition that some flexibility had to be provided with respect to the degree of disclosure demanded of employees subject to the Act.

> "The detailed reporting requirements imposed by this section are by necessity burdensome on the individuals who

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6 Id. at 11

> are required to report. If the Director finds that certain information required to be reported is not necessary to insure the integrity of the Government or the public's confidence in the integrity of the Government, he should have the authority to exclude that information from the reporting requirements and thereby lessen the reporting burden.
>
> The committee points out that determinations by the Director that certain information be excluded from the reporting requirements must be made by regulation, and accordingly, such determinations will be open for public comment and congressional review as provided under section 1205 of title 5, as added by the bill."
>
> H.R. Rept. No. 95-642, Part 1, 38-39.

Despite this measure of flexibility, four members of the Committee, including now Chairman Ford, objected to the provision requiring long-form reporting by employees below GS-16. They observed that some of the persons to be included under Category 8 already were required to report "certain personal financial information" under Executive Order No. 11222.[7] (additional views of Reps. Ford, Wilson, Hanley and Clay). They recognized, however, that "the scope of the reporting obligation imposed by this bill is far more detailed and burdensome than the Executive Order" and objected that employees and reviewing ethics officials whould have to devote substantial amounts of time to "these quite voluminous reports."[8] They concluded that:

> "the President and the Civil Service Commission were correctly prudent in limiting the scope of this legislation to high-level officials. They believe, and we agree, that the task of administering ethics requirements for GS-16's

7 Id. at 92.

8 Id.

> and up--substantial in itself--should be effectively discharged before conclusions are drawn about the need and practicality of extending statutory coverage further, and about the manner in which this should be done."

2. The Judiciary Committee Bill. The Judiciary Committee reported H.R. 1 on November 1977.[9] This bill was the basis for the Executive Branch disclosure provisions as finally adopted in the Ethics Act. Section 201(d) of this bill required officials to file detailed, public, annual disclosure reports containing the financial information set forth in Section 202(a). Section 201(f) specified the six categories of officials required to file under Section 201(d), including employees paid at the level of GS-16 or above. Those reports were to be publicly available, pursuant to Section 205.

Section 207(a) of the bill provided as follows:

> "The President may require officers and employees of the executive branch not covered by this title to submit confidential reports in such form and manner as he shall prescribe."[10] (emphasis added).

This provision is virtually identical to Section 107 of H.R. 6954 as introduced, except for the last phrase giving the President discretion as to the form and manner of the reports.

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9 The House Select Committee on Ethics previously had been given exclusive jurisdiction on legislative branch disclosure and reported its own bill, H.R. 7401.

10 H.R. Rep. No. 95-800, 95th Cong., 1st Sess. 5,6.

The Committee report noted that this provision was intended to authorize the president "to require officers or employees not covered by this title to submit confidential financial statements."[11] In essence, then, the provision provided an explicit statutory basis for continuation of the program already instituted by Executive Order No. 11222. There is no suggestion in the report that the Committee intended these reports be processed under Section 201(d) or that the President be compelled to require disclosure of all the information listed in Section 202(a). Rather, all indications are strongly to the contrary.

Thus, there were three major differences between the Post Office and Judiciary alternatives:

-- Post Office mandated inclusion of certain employees below GS-15; Judiciary made inclusion optional;

-- Post Office required long-form disclosure; Judiciary did not;

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11 Id. at 43.

-- Post Office gave the Director of OGE authority to decide who was included, as well as authority to add to or to relax disclosure requirements generally or in particular cases.[12] Judiciary gave broad power to decide who should file and what should be filed to the President.

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12 It might be argued that in requiring the Director of OGE to act "by regulation" under section 7363(b)(9) and (d), Congress was authorizing him to add to or relax the reporting requirements only on an across-the-board basis. But it is most unlikely that it was contemplated that the Director would engage in such wholesale revision of the statutory scheme. The Committee report specifically states with respect to subsection (b)(9) that:

> "a totally comprehensive financial reporting statute which will adequately address every possible present or future concern simply cannot be drafted. Accordingly, this paragraph and other similar provisions in the bill grant authority to the Director to make provisions to meet future problems or exceptional situations or circumstances. Such exceptions, however, may only be made by regulation and regulations promulgated by the Director are subject to public comment and congressional review as provided in section 1205 of title 5, as added by the bill." (Section 1205 provided for review of the Director's regulations by the Civil Service Commission and for a legislative veto by either House of Congress.)

It is apparent, therefore, that the requirement that the Director act by regulation was intended to impose procedural restraints and to facilitate oversight and not to limit the substance of his actions.

Indeed, seven members of the Judiciary Committee filed minority views objecting to Section 207 precisely on the ground that it would allow the President to impose overly burdensome and intrusive disclosure requirements. The strongest statement was made by Rep. Wiggins:

> Section 207 may be the worst provision in all of H.R. 1. It is difficult to believe that it could ever have been seriously proposed, but incredible that the Judiciary Committee would not strike it (an amendment to which effect failed by a 15-15 vote). As the bill now stands, the President is granted far reaching and unchecked powers to require any and all federal employees to disclose to him any personal information which he requests . . . . The repugnancy of this section, and its potential for abuse are so obvious, I would like to believe that elaboration is unnecessary.[13]

Congressman Ertel, in a separate statement to the report observed of that version of Section 207(a):

> This would include millions of federal employees and the President may demand any and all information that he wants regardless of the privacy of the individual involved and however harassing the requirement may be.
>
> * * *
>
> Under both subsections, the President may, and it seems, is encouraged to ignore those guidelines which Congress designed to ensure that disclosure (1) would reveal only those items which are relevant to potential conflicts on [sic] interest and (2) would not impose excessively burdensome record-keeping requirements.[14] (emphasis added)

Finally, the additional views of Congressman Sieberling, Beilenson, Drinan, Edwards, and Volkmer in focusing on Section 207(b) expressed concern about the Presidential discretion to

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13 H.R. Rep. No. 95-800, at 100 (Minority views of Rep. Wiggins).

14 H.R. Rep. No. 95-800, 95th Cong., 1st Sess. 109-110.

order the reporting and disclosure of any information for ensuring public confidence in the integrity of the Government. Their fear was that this discretion could result in forced disclosure of tax returns, organizational and political affiliations and communications with the press.[15]

The foregoing strongly suggests that the preoccupation of Congress in enacting the language dealing with the "form" of the reports was with limiting the discretion of the President to ask for information different in kind from that required of persons reporting under Title II of the act, information that would constitute an unwarranted intrusion into the personal privacy of those filing confidential reports. Nowhere is it suggested that Congress intended by the use of the word "form" to require identical information of confidential reportees as those filing publicly-available reports under the Act. Rather, it is clear that Congress intended to place some limit on the type of information that could be collected and did not intend to restrict the President's discretion to require less information of those filing confidential reports.

Indeed, a lesser intrusion into the personal affairs of those filing confidential reports is consistent with other legislation dealing with the personal privacy of Federal employees. The general rule for those filing publicly-available reports under Title II is that the person filing is serving in a "position

15 Id. at 114-115.

classified at GS-16 or above of the General Schedule" or serving in a position "at a rate equal to or greater than the minimum rate of basic pay fixed for GS-16."[16]

Persons required to file confidential reports would be serving in positions below the GS-16 or Senior Executive Service level. In enacting the "Government in the Sunshine Act,"[17] Congress noted that in invoking the exemptions on personal privacy, "[b]oth the Senate and House Reports suggest that whether this exemption should be invoked may depend on the official status and rank of the individual, in that the personal privacy interest of a high government official may be narrower than that of a lower level employee or of a private citizen."[18]

It would be consistent with this view and the concern of the Congress for the privacy of lower level employees under the ethics legislation to construe the statutory language of Section 207(a) as placing, at most, an outer limit on the amount and

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16 Title II, Section 201(f)(3). The Senior Executive Service was established as the executive corps at the upper levels in agencies and can be distinguished from "middle management" at grades GS-13 through GS-15. Compare, 5 U.S.C. § 3131 with 5 U.S.C. § 5401(b).

17 5 U.S.C. § 552b.

18 S. Rep. No. 94-354, 94th Cong., 1st Sess. 21-22 (1975); H. Rep. No. 94-880 (Part I), 94th Cong., 2d Sess. 11 (1976).

kind of information that can be required of persons filing confidential reports, but permitting a format requiring less than the statutory provisions of Title II.[19]

3. Uniform Reporting. It has been argued that portions of the legislative history of the Act indicate that the less onerous reporting requirements under Executive Order 11222 were intended to be abolished and that all reports, including confidential reports, were to adhere to the items required by statute under Title II.[20]

The Post Office Committee Report at one stage in consideration of the legislation did say:

> Under the committee's bill, all financial reporting and disclosure in the executive branch will be pursuant to statute. The current executive order system will be abolished.[21]

That statement was true of the Post Office Committee bill only because it contained no provision like Section 207(a) that preserved the President's Executive Order authority. As

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19 It could be argued that the privacy interests of lower level employees are vindicated by keeping the reports "confidential." However, this does not assuage the invasion of privacy that results from filling out the form in the first place and remitting it to the Government for its use. Moreover, keeping the informatin "confidential" except "pursuant" to the requirements of the Privacy Act" may be an illusory protection. See discussion, infra.

20 Memorandum for David R. Scott, Acting Director, Office of Government Ethics, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice.

21 H.R. Rep. No. 642, Part I, 95th Cong., 1st Sess. 26 (1977).

indicated above, the Committee had struck such a provision at the suggestion of the General Accounting Office in favor of a long-form disclosure requirement for mid-level and specified lower-level employees. In the end, however, no provision survived that made "all financial reporting and disclosure in the executive branch . . . pursuant to statute." On the contrary, Section 207(a) contemplates an Executive Order System that would cover employees not required to file by the Ethics Act.

Thus, the legislative history of the Post Office Committee's different proposal is irrelevant to the interpretation of Section 207(a)

4. Floor Consideration. Final House action on the Ethics Act was delayed for several months in 1978 by disagreements among the four commitees with jurisdiction over their respective bills. Finally, a compromise was reached by the floor managers to offer a single comprehensive bill as a substitute (H.R. 13850) covering disclosure by all three branches. Title II, concerning the executive branch, was based closely on Title II of H.R. 1, as approved by the Judiciary Committee. In particular, the substitute rejected the structure of H.R. 6954 and its suggestions that reporting by certain career employees below GS-16 should be mandatory and that the Director of OGE, rather than the President, should exercise the authority to require reports.

H.R. 13850 also adopted Section 207(a), but in a revised form--instead of allowing the President to require reports from mid-level employees "in such form and manner as he shall prescribe," it allowed him to require such reports "in such form as required by this title." This adoption and revision should be understood in light of the history of this provision in the committees, described above. Adoption of Section 207(a) suggests that the House was rejecting the Post Office Committee's approach of statutorily-mandated long-form reporting for mid-level employees, in favor of the Judiciary Committee's approach of giving the President discretionary authority. The revision suggests that the House was acceding to the critics on the Judiciary Committee and providing that the President should not be free to require from mid-level employees information wholly beyond that required of senior officials under the Ethics Act.

The opposite position (construing the section as imposing long-form reporting on mid-level employees whom the President requires to file reports) requires reading the revision as an accommodation to the Post Office Committee majority rather than to the Judiciary Committee dissenters. But the form and placement of the provision refute the suggestion that the floor managers were adopting the Judiciary Committee decision to give the President discretion as to which mid-level employees would file, while also adopting the Post Office Committee decision to require all such reports to be long-form reports. Had this been their goal, they would more likely have retained the structure of

the Post Office Committee bill--leaving the reporting requirement for mid-level employees as Category 8 in the list of those required to file (in what is now section 201(f)), defining that category as all other employees required by the President to file reports, and keeping a provision (in what is now section 205) making reports of Category 8 employees confidential.

The floor discussion confirms this analysis. Section 207(a) was the subject of a motion to delete on the House floor, on the ground that it still gave too much authority to the President. The proposed amendment was rejected after a brief debate. There are two points worth noting in that discussion.

First, no other objection was expressed except that already raised in the Judiciary Committee. The most vocal dissident at that stage, Rep. Wiggins, joined Rep. Danielson in defending the compromise. As he explained:

> It was the intent of the drafters of that [compromise] language to limit the power of and the discretion of the President to require only such information fron noncovered employees as would be compelled of covered employees under this bill. He would not, for example, be permitted to inquire into the sex habits of generals in the Pentagon or any other matter of a personal nature unless that information were compelled in this bill." 124 Cong. Rec. 32002 (Sept. 27, 1978).

The argument of Rep. Schroeder--the floor manager for Post Office and the main proponent of the now rejected H.R. 6954 approach--defending the compromise provision also suggests that its intent was simply to narrow the scope of the H.R. 1 version, and not to convert that system into a proscriptive disclosure system:

> [I]f this amendment were to pass, we would be going back to a much broader power in the President. We would be going back to section 7301 of title 5 of the United States Code, under which it says that the President can prescribe regulations for the conduct of employees in the executive branch. That is a very broad mandate of Executive power.
>
> What we are addressing in section 207(a) and 207(b) of this bill is a limitation on that broad definition of Presidential power in title 5.
>
> Therefore, I would urge this amendment be defeated, because if it passes we would lose this limitation of power.[22]

Against this background of inherent Presidential authority to demand broad financial disclosure from federal employees (subject only to some undefined constitutional check), the floor colloquy thus suggests that Congress intended only to set an upper limit on what he could require--he could not exceed the information required by Section 202(a) for political appointees.

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22 124 Cong. Rec. 32003 (Sept. 27, 1978).

Second, at no time during the debate did anyone suggest that the revision to Section 207(a) served to convert that provision into a mandate that the President must require mid-level employees to disclose all information demanded from political appointees. This silence takes on special significance in light of the fact that several members of the Post Office Committee had raised such objections to the mandatory provisions of H.R. 6954. The failure of any member to raise such arguments against the revised provision--either on the House floor or later in the Senate, which had not had before it (since rejection of the Ribicoff amendment) a mandatory disclosure proposed for mid-level employees--is persuasive evidence that Congress in fact did not expand mandatory long-form disclosure requirements to include GS-15's and below.[23]

Finally, It must be emphasized that even the Post Office and Civil Service Committee bill contained some flexibility in the Director's rulemaking authority. It seems in the highest degree unlikely that in ironing out the differences between the Judiciary Committee approach and that of the Post Office and Civil Service Committee the drafters would have intentionally

23 Section 207(a) was not discussed in the Conference Report or final debate.

opted for a solution which offered less flexibility than there was in either of the two bills before them and which responded to no criticism voiced in either committee report.

In view of the foregoing, it follows that the language of Section 207(a) of the Act calling for confidential reports "in such form as is required by this title" means that confidential reports need not contain the same items of information as required of those filing reports that are available to the public under the Act. This is further evidenced by two elements of the structure of the Act that argue against the proposition that the phrase "in such form as is required by this title" mandates that persons reporting under Section 207(a) must provide all the information required from high-level employees and political appointees.

--First, when Congress intended in other sections of the Act to refer to the long-form disclosure requirement, it referred expressly to the reports to be filed under Section 202(a). Indeed, the following subsection (Section 207(b)) explicitly refers to Section 202(a) in this fashion.[24] Since Congress specifically referenced such reports when it wanted to, the

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24 That section provides as follows:

"(b) The Director of the Office of Government Ethics may by rule require disclosure, in the reports filed pursuant to subsections (a) and (c) of section 202, of gifts received by a dependent child of a reporting individual if the information required to be disclosed does not exceed that which must be reported by a spouse of a reporting individual under this title."

absence of such specific reference in Section 207(a) strongly suggests that a different result was intended.

-- Second, the operative provision of the Act for high-level officers and employees, Section 201(d), provides that [a]ny individual who is [a political appointee or GS-16 or above] described in subsection (f) . . . shall file . . . a report containing the information described in section 202(a)." If Congress had intended that persons required to file by Section 207(a) must file the Section 202(a) report, it is logical to believe that Section 201(d) would have referred to it as well as to Section 201(f). Thus, by negative inference, Congress' failure to include Section 207(a) within the scope of this provision is substantial evidence that it did not intend to mandate long-form disclosure by persons covered by this discretionary mechanism.

Approaching the question from a somewhat different angle, one may ask what conceivable purpose might Congress have had in authorizing the President to require confidential reports from whatever employees he chose but permitting him to request only information specified in section 202, neither more nor less. It has been suggested that this result was consistent with a Congressional desire to preempt the reporting system hitherto existing under Executive Order No. 11222. It is quite true that the report of the House Post Office and Civil Service Committee stated:

> Under the committee's bill, all financial reporting and disclosure in the executive branch will be pursuant to

> statute. The current executive order system will be abolished. H.R. Rept. No. 95-642, Part 1,26.

But, as we have pointed out, the Post Office and Civil Service Committee's bill provided detailed filing requirements for confidential reports by Category 8 employees, as well as an administrative structure relying on regulations by the Director of OGE and close Congressional oversight. Of course, with such a system in place, there would be no room for the existing Executive Order program. However, the Committee Report offers no support for this reading of section 207(a) for two reasons. First, the Post Office and Civil Service Committee bill did not mandate a single uniform report but gave the Director of OGE authority to shape the requirements to meet "future problems and exceptional situations or circumstances." Thus, what the committee sought was not a uniform and procrustean disclosure requirement, but simply a unified reporting system administered by the Director of OGE to replace the patchwork scheme of statute, executive order, and agency regulation which had, in the committee's judgment, proved unsatisfactory. Second, the committee's organizational approach was abandoned in the final bill which drew on the Judiciary Committee bill in all key aspects.

To sum up, the legislative history, the structure of the Act, and the logic of the situation, all point to the same conclusion: that Congress did not intend to require that any reporting requirement imposed under section 207(a) must demand all the financial information specified for public filings in section

202. Indeed, while the circumstances surrounding the revision of section 207(a) are not entirely clear, the only plausible explanation is that the drafters, reacting to the strong criticism in the minority report in the Judiciary Committee, sought to cut back the grant of authority to the President to that level of disclosure which Congress had already determined to be appropriate for the public filing requirement in section 202. They did so inartfully, to be sure, but certainly without intending that their language be read as a requirement that the President require all the information specified in section 202 or none at all.

II. THE LEGISLATIVE HISTORY OF PUBLIC LAW 96-19 CLEARLY INDICATES THAT THE FINANCIAL DISCLOSURE REQUIREMENT IMPOSED ON SPECIAL GOVERNMENT EMPLOYEES CAN BE LESS THAN THAT IMPOSED IN THE PUBLIC DISCLOSURE STATEMENT.

Public Law 96-19 effected numerous technical and conforming amendments in the Act. It is relevant here because a key change concerned the scope of the Act's reporting requirement. As originally enacted, the Ethics Act had exempted persons appointed for 60 days or less from the "annual" report requirements,[25] but did not explicitly exempt these employees from the requirements to file "entrance" reports[26] and "termination" reports.[27] Public Law 96-19 provided an automatic exemption

25 Ethics in Government Act of 1978, Oct. 26, 1978, Pub. L. 95-521, 92 Stat. 1824, § 201(d).

26 Id. § 201 (a) through (b).

27 Id. § 201 (e).

from these two requirements for persons appointed for 60 days or less,[28] and a waiver provision for all requirements for those appointed for 130 days or less.[29]

The legislative history of that provision casts light on the then current understanding as to what reporting requirements could be administratively imposed on employees not covered by the Ethics Act. Especially indicative is the testimony of Bernhardt Wruble, Director of the Office of Government Ethics, in the hearings on the bill that became Public Law 96-19. Wruble initially seemed to indicate that employees exempted by the bill (referring particularly to the 130-days-and-less employees would receive waivers) would file the same financial statements, and that the only change would be that these would not be made public:

> Mr. WRUBLE. Let me say at the outset that there will be a statement filed by these individuals as well as with respect to their financial interests. What is primarily at issue here is whether or not it must be made fully public as with full-time employees of the Federal Government[.]
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> * * *
>
> Mr. HARRIS [Chairman of the subcommittee]. I thought you started out on that one by saying that you weren't

28 Act of June 13, 1979, Pub. L. No. 96-19, 93 Stat. 37, § 2(a)(2) (adding § 201(h) to the Act).

29 Id. (c)(2) (adding § 201(i) to the Act).

> waiving the public disclosure or the ready access of the public to such filing?
>
> Mr. WRUBLE. That is basically it.[30]

However, he then stated that tne bill would lift the reporting burden itself from these employees. He also said that these employees could still be subjected administratively to a reporting requirement, and he made clear (and this is the key point) this administatively-imposed requirement could be less detailed than the extensive Public Disclosure Form 278:

> [Mr. HARRIS]. Is it your belief that with regard to these subsections, . . . that it does not in fact provide the power of waiving the reporting, but only protects the confidentiality of the reporting?
>
> Mr. WRUBLE. No; I believe it goes further than that, and with reason. It is not clear to us, for exa[mp]le, at the present time that those people, for example, who work 60 days or less should be required to file the same extensive report, which we call our form 278, as is required by fulltime employees. There might be reason in certain circumstances to make an adjustment of the content of the reporting requirement as well as the public disclosure aspect. The primary area of controversy here that we encounter from part-time employees and which the legislative branch, as has been related to me has encountered, is [with] the public aspects of the report. But that is not to say that other adjustments of reporting might not be required.[31]

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30 Financial Disclosure Requirements of the Ethics in Government Act of 1978: Hearings on H.R. 2805 Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 2 (1979) (statement of Bernhardt Wruble); H.R. Rep. No. 96-114 (II), 96th Cong., 1st Sess. 10 (1979), reprinted in [1979] U.S. Code Cong. & Ad. News 153, 160.

31 Id.

Other portions of Wruble's testimony and his prepared statement also suggest that the financial report that is administratively required of statutorily-exempt employees can be shorter than the Form 278. He stated that the waiver provision added as Section 201(i) would allow an employee to work up to 130 days "without filing a public financial statement--or perhaps by filing some statement which is modified to some extent . . . ."[32] (emphasis added). His prepared statement noted that exempt short-term employees would have to file "such confidential financial statements as are required by Executive Order,"[33] suggesting that the content of these statements could be defined by Executive Order, and would not be fixed by the reporting requirements of the Act itself.

Other remarks in the legislative history suggest that the reporting requirements of Executive Order 11222 itself are still operative, as applied to employees who are exempt from (or who have obtained waivers from) the Act's reporting requirements. Wruble stated that "there is still a difference between what is required to be reported under Executive Order for employees not of sufficiently high rank to be covered by this act, and what is required under the act."[34] (emphasis added). The same

32 Id. 2.

33 Id. 18. The report of the House Judiciary Committee on the bill makes the same statements. See H.R. Rep. No. 96-114 (II), 96th Cong., 1st Sess. 10 (1979), reported in [1979] U.S. Code Cong. & Ad. News 153, 160.

34 Financial Disclosure Hearings, supra note 30 at 7.

understanding is suggested by the remarks of Senator Ribicoff, Chairman of the Senate Governmental Affairs Committee, in the Senate consideration of the bill: "This provision [exempting persons appointed for 60 days and less] and the Ethics in Government Act have no effect on the obligation under executive order to file a confidential financial disclosure statement."[35] This understanding does not necessarily conflict with Section 207(c) of the Act, through which the Act supersedes prior general reporting requirements, including that of the Executive Order. While the supersession provision can be read as entirely repealing this Order, it can also be read as merely displacing the requirements of the Order as to those employees covered by the Act, and leaving other employees subject to the requirements.[36]

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35 125 Cong. Rec. 12371 (1979). These remarks were not actually made on the Senate floor. However, this does not vitiate their authority, since Ribicoff's remarks are the only substantive remarks in the Record, and he was the relevant committee chairman.

36 It may be objected that this argument makes Section 207(a) (the provision authorizing the President to impose reporting requirements on non-covered employees) superfluous--if Congress did not intend that Section 207(c) was to repeal Executive Order 11222, and that the Act was to occupy the field and to preempt other reporting requirements, why does the President need specific authorization to require such reports. One response to this objection is that Section 207(a) was meant to limit the President's authority to require financial reports by barring requirements more intrusive or exhaustive than those of the Act itself. This purpose is consistent with concluding the old Executive Order to be valid.

The above history supports the contention that special government employees exempted from the public disclosure requirement, can be required by Executive Order to file a confidential disclosure statement that is less comprehensive than the public disclosure form 278.

The legislative history of Pub. L. No. 96-19 demonstrates both that the Director of the Office of Government Ethics took the position at an early date that section 207(a) did not preclude a requirement for less information than was required in the Form 278 and that Congress, informed of this interpretation while it was considering amendments to the Ethics in Government Act, enacted those amendments without acting in any way to upset that interpretation or even to express disagreement. It is axiomatic that an administrative interpretation of a statute has "peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion," Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). Furthermore, "once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation, although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." United States v. Rutherford, 442 U.S. 544 n.10 (1979) (emphasis added).

III. WHEN THE LANGUAGE AND LEGISLATIVE HISTORY OF A STATUTE ARE SUSCEPTIBLE TO DIFFERING INTERPRETATIONS, THE PRACTICAL CONSEQUENCES OF ALTERNATIVE CONSTRUCTIONS CAN AND SHOULD BE CONSIDERED IN DETERMINING WHAT THE STATUTE REQUIRES.

Does Section 207(a) of the Ethics in Government Act of 1978 give the President discretion to require less information than that required to be reported on the Public Disclosure Statement or must it be all or none?

Why is this question important to agency operations? Does it make any difference if the Confidential Financial Disclosure Statement does require all information that is required by the statute for the Public Disclosure Statement? From the point of view of many agencies, how this question is answered is extremely important as it affects their ability to obtain experts, consultants, and members of their advisory committees or members of peer review groups who are appointed special government employees. These agencies have serious concerns, based on their previous experience with their existing Confidential Disclosure Statements, that if these special government employees, providing valuable and public service to the Government, are required to file the more extensive reports, that the agencies would lose the service of a significant number of their experts and consultants, substantially imparing their ability to discharge their statutory missions.

In addition, it should be noted that an extremely large number of government employees are required to file a Confidential Disclosure Statement. If these employees were required to file the information contained in the public disclosure forms, the burden placed on ethics officials in reviewing such information and on the individuals making out the form would be extraordinary. In order to assess this burden, we should look at the experience of agencies with the current public disclosure forms.

Most serious is the potential effect of trying to impose this level of paperwork and perceived invasion of privacy on consultants who serve the Government as panel peer reviewers or as members of advisory committees, mostly for only a few days a year. At present, the form requested from them demands only that they reveal financial interests which relate directly or indirectly to what they are doing for the individual agency. This is consistent with the provisions of the current Executive Order (section 306), and appears reasonable to these special government employees. We contemplate with trepidation the reaction of a consultant or expert who spends a few days a year at Government, for slight recompense, at best, if any, providing peer review of proposals or other advice when asked to provide agencies the details of his or her bank accounts, financial holdings, liabilities, consulting arrangements, etc.

Based on agencies' experience before the 1979 amendments to the Ethics Act, a great many of these consultants would be outraged by the suggestion that they should provide this sort of detailed information to the Government, and would simply refuse to provide it, foregoing the "privilege" of serving on Government's peer-review panels or advisory committees. This would be a serious blow to a number of agencies which depend heavily on advice from people in the private sector.

It may be instructive in this connection to put the proposed Executive Order to the test that the Office of Management and Budget (OMB) wuld apply to a proposal to impose such a paperwork requirement on private institutions or members of the public. That kind of proposal, of course, would be subject to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501 et seq., and to the regulations recently issued under that Act by OMB, 48 Fed. Reg. 12666-96 (March 31, 1983); 5 C.F.R. Part 1320. This regime does not, of course, legally apply to impositions on other Government agencies, but the underlying principle is sound and ought to be equally applicable.

Under the Paperwork Reduction Act regulations, the proposing agency would have to show skeptical OMB officials that the collection of information proposed "is necessary for the proper performance of the agency's functions." In making its

determination, OMB "will consider whether the burden of the collection of [the] information is justified by its practical utility." 5 C.F.R. § 1320.4(c). The proposed collection of the detailed information required by Form 278 from ten times as many people, including many who serve only a few days a year, would not satisfy this test, considering that the collection burden would be very considerable and the information would have almost no practical utility.

The Government may be as overregulated and paperwork-ridden as any enterprise in the nation. The Congress and this Administation have made an effective attack on unnecessary regulation and paperwork imposed by Government on other sectors. It would be well to extend that attack to unnecessary regulation and paperwork imposed by Government on itself.

It is estimated that the typical covered official must expend at least an hour or two each year reading the instructions, digging up the required information, completing the form, and making additions and corrections in response to the agency ethics officials. The agency ethics officials probably spend an average of half an hour on each form. They have to review the form to check whether it is completed properly and whether anything reported suggests a conflict of interest, since they must certify that no such conflict is revealed. Often follow-up questions must be asked, because the filing official has used abbreviations or the ethics official is unable to read or understand the

meaning of what has been written. The ethics official often finds that the filing official has not followed or correctly understood the instructions, so that required information is missing or not in proper form. This requires more follow-up questions and effort.

All this work has not done much good. Conflicts-of-interest issues are taken seriously in the agencies. Real conflicts problems of at least some significance are raised and dealt with daily. It is rare that a conflicts problem of any significance comes to light through this disclosure form.

The reason for this is that the information called for by Standard Form 278 is irrelevant to almost all the work that people do at the differing agencies. For example, at the National Science Foundation (NSF) the work consists of reviewing proposals and other applications from universities. The NSF receives each year approximately 25,000 proposals. After review for scientific merit it makes about 13,000 grants. Of that total, more than 97% are made to academic institutions and non-profit organizations. Thus, all the information on income and interest in real property, and purchases, sales, and exchanges has no significant relation to the normal range of duties of an NSF program official.

At the National Aeronautics and Space Administration (NASA) the work is concerned with research and development in space and aeronautics. The purpose of the Confidential Financial

Disclosure Report is to assure that in the performance of their NASA work both full-time employees and special government employees have no financial interests which would create a conflict of interest, either by way of appearance or by violation of statute. Information as to ownership of a financial interest in aerospace companies, employment by such aerospace companies and existing liabilities to such companies are the relevant information needed by NASA to determine whether a potential or actual conflict of interest exists. Information required by the Public Disclosure Statement of bank accounts, U.S. bonds, rental on houses is of no interest to the agency, but to require such information would do serious damage to NASA's ability to recruit and retain special government employees and full-time mid-level employees. Attached as two addenda are the specific unusual problems that the Office of Legal Counsel opinion would pose for the Department of Energy and the Department of Interior if the proposed Executive Order would require confidential statements equivalent to the Form 278.

With limited exceptions among the agencies, rather than furthering the Government's ethics efforts, the disclosure forms and the effort associated with them seem actually to have weakened the conflicts program, for two reasons. First, they chew up the limited time of agency ethics officials. That leaves less time for advice and educational efforts that really contribute to the integrity of programs and processes and to compliance with substantive conflict-of-interest rules. Second, they damage the image and credibility of the program.

The exercise is widely perceived by those subject to it as a useless effort and as an unwarranted invasion of privacy (a less persuasive criticism, but a prevalent one nonetheless). It leads to loss of respect of the agency's conflicts program and conflicts officials generally.

If it is determined that Section 207(a) does require confidential statements to contain the same information in both substance and form as is required in the Public Disclosure Form 278, the numbers of those filing the form 278 or equivalent would increase more than tenfold, and the administrative burden on those filing and on the agency ethics officials would arguably increase more than tenfold. The level of resentment and derogation of the agency conflicts program would be correspondingly raised.

IV. WHEN A STATUTORY PROVISION IS SUSCEPTIBLE OF ALTERNATIVE INTERPRETATIONS, THE INTERPRETATION SHOULD BE REASONABLE, TAKING INTO ACCOUNT THE PURPOSES OF THE LEGISLATION AND PRACTICES OF AGENCIES AFTER ENACTMENT.

It is a basic rule of legislative interpretation that statutory language must be interpreted in such a way as to avoid an unreasonable result. Indeed, it has been called "a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result."[37] It is our

[37] 2A C.D. SANDS, STATUTES AND STATUTORY CONSTRUCTION, A REVISION OF THE THIRD EDITION OF SUTHERLAND STATUTORY CONSTRUCTION 37 (4th ed. 1973).

collective view that the Office of Legal Counsel interpretation of section 207(a) that mandates imposition of long-form reporting on mid-level employees and special government employees yields an unreasonable result because there can be no rational manner of implementing it.

In Watt v. Alaska,[38] the Supreme Court stated:

> We agree with the Secretary that '[t]he starting point in every case involving construction of a statute is the language itself.' Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

Following from this point, it is important to keep in mind the words of Judge Learned Hand in Cabell v. Markham.[39]

> Of course it is true that the words used, even in their literal sence, are the primary, and ordinarily the most reliable, source of interpretating the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

In furtherance of this thought, the Court in the Watt v. Alaska[40] case stated:

> But ascertainment of the meaning apparent on the page of a single statute need not end the inquiry. Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976) . . . This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' Boston Sand Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.).

38 451 U.S. 259, 265 (1981)

39 148 F.2d 737, 739, aff'd, 326 U.S. 404 (1945)

40 Supra note 38, at page 266.

It is also noted that in Pennhurst State School and Hospital v. Halderman, et al,[41] the Court stated:

> 'In expounding a statute, we must not be guided by a single sentence or number of a sentence, but look to the provisions of the whole law, and to its object and policy' Philbrook v. Glodgett, 421 U.S. 707, 713 (1975), quoting United States v. Heirs of Boisdore, 8 How. 113, 122 (1849). . . . the specific language and history of § 6010 are ambiguous. We are persuaded that § 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment.

Finally in Ruckelshaus, Adminstrator, EPA v. Sierra Club, et al,[42] the Court stated in its interpretation of Section 307(f) of the Clean Air Act:

> This result is the most reasonable interpretation of Congressional intent."[43]

It is relevant to look at the general principles underlying the financial disclosure system embodied in Title II of the Ethics Act, as amended as revealed by the Act itself. The extensive listing of who is required to file, contained in section 201(f) of the Act, indicates that Congress wished to determine which groups of individuals would be required to provide the extensive information required by section 202. In light of this, it seems reasonable to assume that, if Congress intended to apply section 202 to other levels of Executive Branch personnel, some attempt

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41 451 U.S. 1, 18 and 19 (1980)

42 51 L.W. 5132 (1983)

43 Id. at p. 5133.

would have been made to provide criteria by which to identify such employees. That Congress was likely to use such an approach is illustrated by the provisions relating to designation of senior government employees in the amendments to 18 U.S.C. 207 (contained in Title V of the Ethics Act), and by those permitting exemption of certain employees in the competitive service from the application of Title II (see section 201(f)(5) of the Act). That Congress intended to specify who should be subject to the requirements of section 202 is further illustrated by section 201(d) of the Ethics Act, which exempts employees designated in subsection (f) who perform the duties of their office for sixty days or less in a calendar year. It is difficult to believe that Congress wished to exempt such individuals from the requirements of Title II, but at the same time left the door open to imposition of the very same requirements through an executive order.

It is our belief that there is not an adequate legal basis for requiring that all such individuals should, in effect, be held subject to the requirements of Title II of the Ethics Act. Instead of helping administrative officials to do their jobs more effectively, such an approach could overtax their resources to the point where the effectiveness of the entire financial disclosure system would be severely diminished which would clearly violate the purpose and intent of the Ethics Act, as amended.

Additionally, long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration also serves as a tool for determining the meaning of a doubtful statute. In fact, this aid to interpretation has been recognized as one of the most definite and reliable sources of statutory meaning, and there are numerous decisions recognizing established usage in regard to the meaning and effect of a statute as a relevant and persuasive guide to its authoritative interpretation.[44] It is, therefore, useful to look at the activities of various government agencies with respect to imposition of financial disclosure requirements on employees below grade 16.

It is our understanding that, since the enactment of the Ethics Act, government agencies, including the Office of Government Ethics, have generally continued to act on the belief that the abbreviated financial disclosure report that they have prescribed for mid-level personnel and special government employees is the appropriate tool for financial disclosure by such employees, and that such reporting requirement is in compliance with law. Except for the Department of Justice, we are not aware of any other agency that has suggested that section 207(a) of the Ethics Act makes the use of such forms illegal. Moreover, if the position that the President's authority is limited to requiring financial disclosure reports whose contents comply with the requirements of section 202 of the Ethics Act prevails, the agencies that have been collecting the abbreviated reports

44 Supra note 37 at 233, 250.

may be faced with the question of whether they may continue to retain such reports in their files. Equally important, employee discipline that may have been imposed based on information obtained from such reports could be subject to question.

In this connection, it should also be pointed out that the Ethics Act was only recently before the Congress. While amendments were made to Title II of the Ethics Act, the language of section 207(a) was left intact. The established practice with respect to the filing of abbreviated financial disclosure reports by government employees below grade 16, and special government employees is well-known to Congress. Extensive oversight hearings were held in connection with the reauthorization of the Office of Government Ethics. Yet Congresss never raised the question whether the agency practices violated the intent of these sections. Under the circumstances, this Congressional silence is persuasive evidence as to the proper interpretation of Section 207(a).

CONCLUSION

It is evident from the foregoing analysis, that the language and legislative history provide no support for requiring long-form disclosure by these employees. The reports on which the Office of Legal Counsel relies for its position that the Congress intended that the financial reports (both public and confidential) contain the same information pertained to a fundamentally

different disclosure provision that Congress consciously rejected and which does not appear in the Ethics Act.

At worst the legislative history of Section 207(a) renders the interpretation of this provision ambiguous. Under such circumstances, reasonableness of interpretation in view of the intent of the legislation as a whole and the practices of agencies must be taken into account, along with policy considerations.

It is submitted that under this criteria, and pursuant to the legislative history recounted in the above analysis, the most reasonable interpretation of Section 207(a) in the Ethics Act, as amended, is that the President has discretion to determine what information should be required in confidential statements of mid-level and special government employees as long as he does not require more information than is contained in the public disclosure reports. At the very least, it is beyond doubt that special government employees working for the Government 60 days or less, are to be treated differently than full-time government employees, as is evidenced in Mr. Wruble's testimony on Public Law 96-19. and the action taken by the Congress thereafter.

ADDENDUM I

Department of Energy

In commenting on a proposed Executive Order that would impose a uniform financial disclosure system for all Executive Branch employees (i.e., requiring confidential financial disclosure reports to provide the same information as publicly available reports), the Department of Energy (DOE) drew attention to the following difficulties that would arise from imposition of such a system on DOE employees:

1. The Department of Energy Organization Act (Pub. L. 95-91) contains its own financial disclosure requirements. Section 603 of the DOE Act requires public disclosure of energy concern interests by all DOE employees who are not specifically exempted by the Secretary of Energy (only certain employees at or below grade 12 may be exempted). For DOE employees who are required to file under the Ethics Act, this is accomplished through the filing of Standard Form 278, the "Executive Personnel Financial Disclosure Report." Currently, all other employees use DOE Form 3735.1, "Report of Financial Interests."[45] Under the DOE Act, instead of designating employees who are required to file (as is provided by the proposed order), DOE must designate employees who are not required to file. In addition, under the

45 In 1982, approximately 540 Standard Forms 278 and 6,270 DOE Forms 3735.1 were required to be filed by regular DOE employees. In addition, approximately 50 Standard Forms 278 and 30 DOE Forms 3735.1 were required to be filed by DOE consultants.

DOE Act, the reports of energy concern interests must be available to the public for six years after the reports are received. Thus, if the proposed Executive Order is approved, DOE employees may be subject to two different filing requirements. As a result, DOE employees who are not required to file a report that is subject to public disclosure under the Ethics Act, but who are required to file a confidential report pursuant to the proposed order, would either have to fill out a modified form that makes separate provision for public reporting of energy concern interests or they would have to file two separate forms.

2. Under the proposed unified financial reporting system, the volume of data that will have to be reported and reviewed will increase dramatically. It is estimated that if all grade 13, 14, and 15 DOE employees were required to file Standard Form 278 or an equivalent form, the amount of time spent by DOE attorneys reviewing financial disclosure forms (assisting employees in filling them out) would rise from 1,400 hours to 4,000 hours per year. Employee time required to fill out the forms would rise from 1,250 to 2,300 hours, though the latter figure can be expected to be much higher during the first year of implementation due to employees' unfamiliarity with the form.

3. DOE has had considerable experience with implementation of the financial disclosure requirements imposed by the Ethics Act. The internal redundancy of the reporting required on a Standard Form 278 (in large measure dictated by the terms of the Ethics Act), combined with the length and complexity of the

instructions for completion of the form, bewilders even high-level employees with sophisticated private sector backgrounds. As a result, many individuals complete the form without reading the instructions. Therefore, extending the same requirements to a much larger group of employees may tend to impugn the reliability of the reporting system, defeating its very purpose. This would be exacerbated in the case of employees, if they were required to complete two different forms (see comment 1, above).

ADDENDUM 2

Department of the Interior

There are persuasive practical reasons to reject the Office of Legal Counsel interpretation of § 207 (a). Indeed, the Office of Legal Counsel has recognized that the support for its position was not all that clear. The practical problems that will result from the Office of Legal Counsel interpretation, which are summarized below, further support adopting the position set forth in this opinion.

1. The Office of Legal Counsel interpretation will result in a requirement that all employees that file the confidential forms, including special government employees who are members of advisory boards, will have to provide a significantly larger amount of personal financial information to agency officials for review.

This factor can have a significant impact to discourage experts from the private sector from serving as consultants to the Government. Most of Interior's advisory committees provide advice in highly technical areas, e.g., the Commission on Fair Market Value Policy for Federal Coal Leasing. The Office of Legal Counsel's interpretation could make it exceedingly difficult to find qualified individuals to serve on advisory committees or commissions of this type because of the additional disclosure requirements.[46] While in theory the forms filed by

[46] Recently § 201 of the Ethics Act was amended by adding a new §(j) which applied the financial disclosure requirements to the staff of advisory committees composed in whole or in part by special government employees. Pub. Law 98-150, November 11, 1983. We do not consider this provision as having any substantive impact on our conclusions relating to the interpretation of § 207(a).

such individuals serving at grades below the GS-16 level are to be kept confidential, there seems to be widespread knowledge both within and outside the Government as to the practical limits on the confidentiality of information that the Government has in its possession.[47]

Under Interior's confidential reporting system, employees are required to report all their holdings in the following areas: (1) financial interests; (2) interests in real property; (3) current employment, and (4) creditors. In contrasts, the public disclosure form has a floor for reporting financial interests in that a financial holding that earns less than $100 per year in income and is less than $1,000 in value need not be reported. In addition, the public disclosure forms require considerably more detail than the confidential forms in such areas as gifts, sales and exchanges of property, prior employment and liabilities.

Pursuant to the Office of Legal Counsel interpretation of § 207(a) the Department of the Interior will have to abandon its current confidential form, and implement a new expanded form that will undoubtedly be patterned after the public disclosure form. If a massive refiling were required this could have a significant impact, considering that some 10,534 Interior employees are

47 The recent holding in Washington Post v. HHS, GDS 82, 479 (D.C. Cir. 1982), raises some questions as to whether the Freedom of Information Act's exemption (6) affords adequate protection to the information disclosed by special government employees serving on an advisory commmittee. This concern is also addressed in OPM's August 1, 1983 letter to OMB.

currently filing the confidential forms pursuant to the Executive Order system. The additional detailed information that will be provided on the new form will be of little value whereas the elimination of the information in the lower categories of value, that are not required by Title II of the Act, will have a detrimental effect on our ability to determine compliance with our specialized statutory restrictions.

2. The Office of Legal Counsel interpretation eliminates an effective tool for enforcing the restrictions in various specific conflict of interest laws that apply to Interior.

The provisions of the Surface Mining Control and Reclamation Act (SMCRA) provide an excellent example of the statutory prohibition problem. In particular, § 201(f) of SMCRA (30 U.S.C. 1211(f)), restricts Federal employees from holding financial interests in underground or surface coal mining operations and imposes certain monitoring and enforcement obligations on the Director of the Office of Surface Mining including the filing of statements concerning financial interests of covered employees. A criminal penalty is imposed for knowingly having a direct or indirect financial interest in underground or surface coal mining operations while performing functions or duties under SMCRA as a Federal employee.

The intent of Congress concerning the absolute nature of this prohibition is well established in the legislative history of SMCRA. Briefly, Congress considered an amendment which would have allowed employees subject to the prohibition to hold no more

than 100 shares of stock in a prohibited coal mining company. Ultimately, Congress rejected this amendment thereby demonstrating its intent that the prohibition applies to financial holdings of even one share of stock in a prohibited coal mining company.[48]

The Director of the Office of Surface Mining currently has, perhaps, only one effective method of enforcing the prohibition; i.e., to require a complete confidential financial disclosure statement from covered employees and one that shows financial holdings below the categories of value set by Title II of the Ethics in Government Act filing requirements. Under the Office of Legal Counsel interpretation, the Director would not have access to the specific information necessary to enable him to discharge his enforcement responsibilities. Moreover, there seems little doubt that the Ethics Act did not eliminate either the conflict prohibition in the SMCRA or the Director's responsibility to enforce that restriction.

In addition to SMCRA, the Department uses the confidential reports authorized by the Executive Order to determine compliance with other absolute prohibition type restrictions applicable to various Departmental bureaus. These include the following: the Bureau of Land Management (43 U.S.C. § 11); the Bureau of Mines (30 U.S.C. § 6); the Geological Survey (43 U.S.C. § 31(a)), and the Bureau of Indian Affairs (18 U.S.C. § 437). To enable the

48 121 Cong. Rec. 7044, March 18, 1975.

Department to determine compliance with these specialized restrictions the Department needs to know if an employee owns even one share of stock in a company that falls within the prohibitions. Under the current form the Department obtains such information. Under the form that would be patterned on the public disclosure form, this information would not be required. Our records show that there are approximately 44,330 employees in the various bureaus that are subject to these absolute prohibitions and an additional 425 employees that have been made subject to the prohibitions by regulatory extension.

In summary, while the Office of Legal Counsel interpretation appears to simplify the reporting system, it will cause substantial problems for Interior and other comparably situated agencies because of the specialized prohibitions applicable to employees. To discharge adequately Interior's responsibilities for compliance with the conflict prohibitions that are applicable to Interior employees, it will be necessary for Interior to modify any new form that may be imposed as a result of the Office of Legal Counsel opinion so that Interior may continue to obtain the same information as is required by the current form. The Office of Legal Counsel opinion will force agencies such as Interior to obtain a substantial amount of information that they do not need. Given the lack of a firm legal basis that requires the conclusion reached in the Office of Legal Counsel opinion, it is our view that the Office of Legal Counsel opinion interpretation of § 207(a) should not be adopted as the Government's positon on this issue.